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## Viewing cable 09QUITO905, Ecuador's Plans to Terminate All Bilateral Investment

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Every cable message consists of three parts:

- The top box shows each cables unique reference number, when and by whom it originally was sent, and what its initial classification was.
- The middle box contains the header information that is associated with the cable. It includes information about the receiver(s) as well as a general subject.
- The bottom box presents the body of the cable. The opening can contain a more specific subject, references to other cables ([browse by origin](#) to find them) or additional comment. This is followed by the main contents of the cable: a summary, a collection of specific topics and a comment section.

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If you find meaningful or important information in a cable, please link directly to its unique reference number. Linking to a specific paragraph in the body of a cable is also possible by copying the appropriate link (to be found at the paragraph symbol). Please mark messages for social networking services like Twitter with the hash tags **#cablegate** and a hash containing the reference ID e.g. **#09QUITO905**.

Reference ID	Created	Released	Classification	Origin
<a href="#">09QUITO905</a>	<a href="#">2009-10-27 22:20</a>	<a href="#">2011-08-30 01:44</a>	<a href="#">CONFIDENTIAL//NOFORN</a>	<a href="#">Embassy Quito</a>

Appears in these articles:

<http://www.eluniverso.com/2011/04/26/1/1355/cable-231669.html>

VZCZCXYZ0008  
OO RUEHWEB

DE RUEHQT #0905/01 3002220  
ZNY CCCCC ZZH  
O R 272220Z OCT 09  
FM AMEMBASSY QUITO  
TO RUEHC/SECSTATE WASHDC IMMEDIATE 0261  
INFO RUCPDO/DEPT OF COMMERCE WASHINGTON DC  
RUEAIIA/CIA WASHINGTON DC  
RUEATRS/DEPT OF TREASURY WASHINGTON DC  
RUEHBO/AMEMBASSY BOGOTA  
RUEHBR/AMEMBASSY BRASILIA 0061  
RUEHCV/AMEMBASSY CARACAS 0085  
RUEHGL/AMCONSUL GUAYAQUIL  
RUEHLP/AMEMBASSY LA PAZ NOV OTTAWA  
RUEHPE/AMEMBASSY LIMA 0099

C O N F I D E N T I A L QUITO 000905

SENSITIVE  
SIPDIS  
NOFORN

E.O. 12958: DECL: 2034/10/27  
TAGS: [ECON](#) [EFIN](#) [EC](#) [PREL](#) [ETRD](#) [EINV](#)  
SUBJECT: Ecuador's Plans to Terminate All Bilateral Investment  
Treaties

CLASSIFIED BY: Heather M. Hodges, ...

id: 231669  
date: 10/27/2009 22:20  
refid: 09QUITO905  
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classification: CONFIDENTIAL//NOFORN  
destination:  
header:  
VZCZCXYZ0008  
OO RUEHWEB

DE RUEHQT #0905/01 3002220  
ZNY CCCCC ZZH  
O R 272220Z OCT 09  
FM AMEMBASSY QUITO  
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----- header ends -----

C O N F I D E N T I A L QUITO 000905

SENSITIVE  
SIPDIS  
NOFORN

E.O. 12958: DECL: 2034/10/27  
TAGS: [ECON](#) [EFIN](#) [EC](#) [PREL](#) [ETRD](#) [EINV](#)  
SUBJECT: Ecuador's Plans to Terminate All Bilateral Investment  
Treaties

CLASSIFIED BY: Heather M. Hodges, Ambassador, U.S. Department of  
State, Executive Office; REASON: 1.4(B), (D)

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Summary  
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¶1. (C) The Government of Ecuador is preparing to terminate existing Bilateral Investment Treaties (BITs) with seventeen countries, including the United States, with the goal of replacing them with investment agreements that do not/not include national treatment, allow only local or regional dispute arbitration, and align foreign investment with Ecuador's national development plan. Acting Foreign Minister Lautaro Pozo informed the Ambassador of this decision October 26 and will notify other Ambassadors over the next week. Pozo explained that Ecuador's new constitution requires this action, and the GoE must begin negotiating substitute investment agreements to avoid legal challenges from "extreme left" groups. The GoE has already sent a proposal to the National Assembly, but Pozo noted this would be a lengthy process. Nevertheless, the GoE hopes to be able to present a proposed replacement agreement to the U.S. during the upcoming Bilateral Dialogue. The Ambassador noted the bad timing of this move, given the imminent Bilateral Dialogue and Trade and Investment Council meetings, pending renewal of ATPDEA, and other actions complicating bilateral relations recently. She predicted the GoE would have a difficult time explaining this to Washington. End Summary.

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## Constitution Requires Renegotiation of Existing BITs

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12. (C) Acting FM Pozo called in the Ambassador on October 26 to inform her of the GoE's decision to replace all its existing BITs with a less formal "model" investment agreement that complies with Ecuador's new constitution (which entered into force October 2008). The awkward title of this new agreement is roughly "Framework Agreement for the Promotion of Investment Complementary to Development." Pozo said Ecuador has 17 BITs in force and he would be delivering the same message to the other countries' ambassadors over the next week, but wanted to deliver it to the U.S. first. He added that the GoE did not want the U.S. to hear it first from the press. The MFA plans to meet with the EU ambassadors as a group October 27, then Canada, and then will notify its UNASUR and ALBA compatriots and China next week. The Ambassador noted that Ecuadoran Ambassador Gallegos had given us a heads-up late last week without providing details. The Ministry's legal advisor Marco Albuja Martinez and Director General for North America Juan Salazar participated in the meeting. (Salazar later admitted privately to the Ambassador that this meeting was the first he had heard of this initiative.)

13. (C) Pozo and Albuja explained that the 2008 constitution imposed new limits on the types of agreements that the GoE may enter into, and also provided a timeline under which the GoE must begin to revise all outstanding agreements that do not comply with the new constitutional standards. Albuja noted that the GoE has four years to make the necessary legal changes, but that the GoE was required to begin amending or changing agreements or treaties within 12 months of entry into force of the constitution. Given that the constitution was now one year old, the GoE must begin the process or face potential legal challenges. He explained that Ecuador's constitution was the only one in the world that considered the concept of "judicial security" as a "human right," which exposed the GoE to legal action. He confided, furthermore, that the GoE was aware of "extreme left" groups preparing to launch just such challenges. In response to the Ambassador's question as to whether

the constitution recognized or grandfathered existing treaties and agreements, Albuja said that it did recognize them, but also obliged the GoE to revise clauses that were not in compliance. The Ambassador retorted that if that was the case then, in effect, the new constitution did not recognize existing agreements. (Pozo and Albuja both conceded that the protections afforded under the U.S. BIT would continue in place for current investors for 9 years after termination of the agreement.)

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Political Objective: Favor Locals

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14. (C) Albuja explained that the GoE has three objectives in replacing the current BITs with a substitute agreement: 1) eliminate the concept of "national treatment;" 2) allow only local and regional arbitration for the settlement of disputes; and 3) align foreign direct investment so that it "complements" the GoE's national development plan. Albuja noted that national treatment "discriminates against local investors," but did not explain the logic of this assertion.

15. (C) Regarding arbitration, he said that the Constitution

"recognizes alternative methods of dispute settlement," but only via national and regional institutions or fora. He said the GoE was in discussions with ALBA, UNASUR, and ALADI regarding the establishment of dispute settlement systems, and he was also aware that UNCITRAL was considering setting up an arbitral center in Buenos Aires (which would presumably qualify). These new arbitration mechanisms would welcome the inclusion of international experts and judges, he promised, but the key was that it be a "Latin American process." (Comment: we were aware that the new constitution prohibited Ecuador from entering into treaties or international agreements ceding jurisdiction to non-regional arbitration tribunals, but understood that this provision would not be applied to existing BITs.)

¶6. (C) Albuja explained that the GoE also wanted to ensure that FDI complemented the country's national investment objectives and was consistent with the National Development Plan. As an example, he noted that the constitution declared that Ecuador should aim to become a major center for tourism by 2015. So, if a foreign investor expressed interest in investing in a sector that did not correlate well to the GoE's "vision," the GoE would work with the country of the prospective investor to get them to invest instead in a sector such as tourism that the GoE deemed acceptable. He provided a convoluted explanation of how this would work, but the concept was basically that the GoE would coordinate with other governments to make sure the investment was appropriate.

¶7. (C) Albuja said that this was how Ecuador had been managing investment decisions with Brazil and Colombia, and asserted that it had worked well and allowed all parties to address issues early on and avoid future disputes. Referring to a 2008 bilateral spat where Brazil pulled its Ambassador to Ecuador over a dispute involving one of its companies (Odebrecht), the Ambassador pointedly noted that Ecuador and Brazil's commercial relations over the last year have not been so rosy, so this mechanism was not flawless. She also pointed out that the U.S. does not instruct its companies how to invest, so that strategy might work with China, but would not work with us.

¶8. As evidence of how serious the GoE was in making sure that the BITs were appropriately focused and effective, Albuja pointed out that the GoE had terminated nine BITs during 2008, all with other LatAm countries, on the basis that they had failed to attract sufficient investment. The Ambassador commented that annulling BITs does not seem the best way to attract investment, and said it was ironic that other GoE officials were pressing her and the USG to increase U.S. investment in Ecuador, while at the same time the GoE was pursuing a policy that would likely deter it. She added that it was precisely because of the uncertainty created by just this type of initiative that we were not seeing much new U.S. investment. With a reckless disregard for the importance of foreign investment, Albuja responded with the assertion that FDI was not really that important to Ecuador anyway, having increased in recent years from only 1.8% to 2.6% of GDP. (Comment: Both we and our Canadian Embassy friends believe this number to be well short of the true mark, but, regardless, the perspective is troubling.)

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GoE Initiative Submitted to the National Assembly

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¶9. (C) Pozo said the GoE had sent a proposal to "renounce" all existing BITs to the National Assembly's Committee on Sovereignty, Integration, International Relations, and Integral Security for review. This committee, headed by Fernando Bustamante, would review the proposal and then send it to the full Assembly for a

vote, after which the Assembly would send it back to the Executive for approval and signature. He speculated that this would be a lengthy process. However, the GoE hoped to be able to present a draft of the new agreement during the November 10 Bilateral Dialogue meeting in Washington.

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Initial Embassy Response: Bad Timing, Bad Idea  
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¶10. (C) The Ambassador promised to consult with Washington on this news, and clarified that she did not have explicit Washington guidance. However, she noted that this initiative was poorly timed, given that our two countries were about to hold high-level meetings in Washington, given that Congress would soon be reviewing whether to renew or extend both ATPDEA and GSP trade preference programs, and given all the difficult issues our countries had been dealing with directly. (Comment: Our MFA interlocutors are well aware of our concerns over the President's recent decree for compulsory licenses of patented pharmaceutical products, our concerns about GoE interaction with the U.S.-designated Export Development Bank of Iran, the precarious renegotiation of the airport construction project, problematic negotiations over USAID assistance programs, Chevron's allegations of corruption in their local court case, and the GoE's decision not to renew the Manta FOL lease, among others.)

¶11. (C) The Ambassador also commented that, to our knowledge, few if any countries had canceled BITs with the U.S., adding that U.S. BITs actually served as a "seal of approval," encouraging other countries to negotiate their own BITs and also reassuring other countries' investors of the operating environment. She added that it was a shame that the GoE had decided to move forward with this initiative, and speculated that the MFA would find it difficult to

explain the decision to Washington.

¶12. (C) Albuja noted that the GoE had been considering this action for quite a while, and he even asserted that Foreign Minister Falconi had mentioned it during his meeting with the Secretary. When the Ambassador said the U.S. side thought Falconi had been referring to the GoE's proposal for a Trade for Development Agreement, Albuja admitted this and explained that the investment agreement was linked to (or part of) the Trade for Development Agreement. In response to the Ambassador's push back on this initiative, Pozo, looking sheepish, admitted that this was a "complicated period" that the GoE would need to work through, and also speculated that they would likely need to lobby the U.S. Congress to explain the GoE's point of view.

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Comment: They Want it Their Way  
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¶13. (C) This decision is entirely consistent with the Correa government's desire to have increasing control over all resource flows and over the economy writ large. On the trade side, the GoE is pushing bilateral agreements with the U.S. and Canada - two of its major commercial/investment partners -- that give it one-sided preferential access with few, if any, conditions (i.e., delinked from counter-narcotics efforts). Similarly, the GoE is pushing

donors, including USAID, to funnel all official assistance through the national development agency (AGECI), instead of through NGOs. The GoE is also increasingly favoring investments from large foreign state-owned companies, such as from Venezuela and China, which also ensure the GoE is able to wield control over their investment decisions. This latest move takes government involvement in private sector decisions to a new level. The Embassy will be reaching out to other affected Embassies to gauge their reaction, but we fully expect the private sector reaction to be strongly negative when this issue hits the press, especially as it comes right on the heels of the President's decree on compulsory licensing. End Comment.

HODGES

=====CABLE ENDS=====